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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

NELLEY LIDY, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

A regulation of the Secretary of Health and Human Services (20 C.F.R. 404.950(d)(1)) authorizes an administrative law judge, on finding that a subpoena is "reasonably necessary for the full presentation of a case," to issue such a subpoena for a disability benefits hearing under the Social Security Act. The question presented in this case is whether, even in the absence of the showing of need required by this regulation, the Due Process Clause provides an applicant for disability benefits with an "absolute right" to subpoena and orally examine a physician whose written report is accepted as evidence by the Secretary.

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No.

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v.

NELLEY LIDY, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Louis W. Sullivan, M.D., Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 911 F.2d 1075. The opinion of the district court (App., *infra*, 6a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 66a) was entered on September 17, 1990. A petition for rehearing was denied on November 28, 1990 (App., *infra*, 65a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor sha'l private property be taken for public use, without just compensation.

2. Section 205 of the Social Security Act, as amended, 42 U.S.C. 405, provides in pertinent part:

A. 42 U.S.C. 405(b)(1):

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request * * *, he shall give such applicant * * * reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. * * * The Secretary is further

authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

B. 42 U.S.C. 405(d):

For the purpose of any hearing, * * * authorized or directed under this subchapter, * * * the Secretary shall have power to issue subpoenas requiring the attendance and testimony of witnesses * * *.

C. 42 U.S.C. 405(g):

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * * The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a hearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. * * *.

3. 20 C.F.R. 404.950(d)(1) provides:

When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may,

on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

STATEMENT

1. In 1982, respondent Nelley Lidy, Jr., having undergone surgery for back injuries, applied for a determination that he was entitled to disability benefits under the Social Security Act as a person who was unable "to engage in any substantial gainful activity by reason of [a] medically determinable physical * * * impairment." 42 U.S.C. 423(d)(1)(A). The application was denied, however, because respondent was gainfully employed at the time the application was submitted. App., *infra*, 13a.

2. Respondent thereafter sought reconsideration of his application for disability benefits, reciting that his employment had been terminated after a recurrence of his injury. App., *infra*, 13a. While this application was pending, respondent was treated for his injury by Dr. Louis A. Finney. On March 28, 1984, finding that respondent's general physical condition was now "within normal limits," Dr. Finney released respondent "to return to gainful employment" (App., *infra*, 14a).

3. Prior to the administrative hearing on respondent's application for disability benefits, respondent requested the agency to subpoena Dr. Finney for an oral examination pursuant to 20 C.F.R. 404.950(d)(1). This regulation authorizes the administrative law judge to issue a subpoena when "reasonably necessary for the full presentation of a case." *Ibid.*[1]

[1] 20 C.F.R. 404.950(d)(1) was adopted under authority of 42 U.S.C. 405(d), which grants the Secretary power to issue

The administrative law judge denied respondent's request for an oral examination of Dr. Finney, ruling instead that respondent should first depose the doctor by written interrogatories. App., *infra*, 23a-24a.

4. Respondent thereafter issued written interrogatories to Dr. Finney. Respondent was not satisfied with Dr. Finney's responses and applied again to the administrative law judge for a subpoena. At the same time, respondent also sought to serve a second set of written interrogatories on Dr. Finney. App., *infra*, 55a-56a.

5. The administrative law judge denied both requests. The judge found that Dr. Finney had provided thorough answers to respondent's first set of written questions and that further inquiry would be unproductive and "would border on harrassment [*sic*]." App., *infra*, 56a.

6. The administrative law judge thereafter issued his decision on the merits, denying the application for disability benefits based upon a finding that a condition of disability did not exist. App., *infra*, 48a-64a. After the Appeals Council denied respondent's request for further administrative review, respondent brought an action for judicial review in federal district court pursuant to 42 U.S.C. 405(g).[2]

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subpoenas, and 42 U.S.C. 405(a), which authorizes the Secretary to adopt rules "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

[2] While the case was pending in district court, the parties agreed to a remand for findings under newly issued regulations on the question of mental impairment. After these proceedings on remand, the finding of no disability was confirmed by the agency (App., *infra*, 47a) and the case was returned to district court.

7. The district court upheld the agency's determination. The court held that respondent's request to subpoena and orally examine Dr. Finney was a matter committed to the discretion of the administrative law judge under 20 C.F.R. 404.950(d)(1), and that the judge did not abuse this discretion in denying the request in this case. App., *infra*, 8a. The court therefore found that the written report of Dr. Finney was properly received and considered by the agency and, "being so considered, constitute[d] substantial evidence in support of the decision." *Ibid.* See 42 U.S.C. 405(g) (findings supported by substantial evidence "shall be conclusive").

8. The court of appeals vacated the judgment of the district court and remanded the case for further proceedings. The court held that due process requires that applicants for disability benefits be afforded an "absolute right" to subpoena and orally examine the reporting physician. App., *infra*, 4a. In reaching this conclusion, the court of appeals relied on this Court's decision in *Richardson* v. *Perales*, 402 U.S. 389 (1971), and on decisions in other circuits that have read *Perales* to require, as an element of due process, that disability applicants be afforded the right to subpoena and cross-examine reporting physicians at the agency hearing. App., *infra*, 4a, citing, *e.g.*, *Coffin* v. *Sullivan*, 895 F.2d 1206 (8th Cir. 1990); *Wallace* v. *Bowen*, 869 F.2d 187 (3d Cir. 1989).

9. The court of appeals further concluded that, since the Due Process Clause requires that the applicant be afforded an absolute right to subpoena the reporting physician for oral examination, the court would give no effect to the regulation permitting a subpoena to be refused by the administrative law judge when the evidence sought is not "reasonably necessary for the full presentation of the case." App.,

infra, 4a, quoting 20 C.F.R. 404.950(d). The court of appeals acknowledged, however, that Lidy had "failed to make" the showing required by the regulation as a precondition to issuance of the subpoena. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

The issues presented by this case are of substantial significance to the proper administration of the federal disability benefits program and, ultimately, to federal administrative action generally. The Fifth Circuit's sweeping decision is not only important to the orderly administration of an important federal program but is in conflict with the rulings of several other courts of appeals.

The holding of the court of appeals that every applicant for federal disability benefits has an "absolute right" to subpoena and orally examine every reporting physician threatens to impose enormous financial and procedural burdens on a program under which "[m]illions of claims are filed every year" (*Schweiker* v. *Chilicky*, 487 U.S. 412, 424 (1988)). The decision threatens these same far-reaching consequences to administrative action generally, for, as this Court observed in *Richardson* v. *Perales*, 402 U.S. 389 (1971), the procedural structure of the Administrative Procedure Act was "modeled upon the Social Security Act." *Id.* at 409.

In reaching its conclusion in this case, the court of appeals failed to apply the three-part analysis of due process requirements articulated by this Court, and applied by the Court to Social Security Act eligibility determinations, in *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). The court of appeals thus failed to consider whether an "absolute right" to subpoena and

examine reporting physicians would materially alter the risk of erroneous eligibility determinations and whether such a right would unduly and inefficiently burden the administrative process. Instead of applying the analysis required by *Mathews* v. *Eldridge*, the court of appeals concluded (App., *infra*, 4a) that the due process right of a disability applicant to subpoena and examine reporting physicians had been established by this Court as a direct holding in its decision in *Richardson* v. *Perales*, 402 U.S. at 402. In so ruling, the court of appeals has misapplied this Court's decisions and has created a conflict with the decisions of other courts of appeals.

1. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). In determining the procedural safeguards that must be provided before Social Security Act disability benefits may be terminated, the Court has established a three-part analysis:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. *Eldridge*, 424 U.S. at 335. See *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). Applying this analysis in the context of the "unusually protective" statutory process for the administrative review and dis-

position of disability claims (*Schweiker* v. *Chilicky*, 487 U.S. at 424, quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)), the court of appeals should have upheld the agency's regulation that authorizes subpoenas for the examination of reporting physicians when they are "reasonably necessary for the full presentation of [the] case" (20 C.F.R. 404.950 (d)(1)). Since the required showing of reasonable necessity was not made by respondent in this case (App., *infra*, 4a), the administrative decision should have been sustained.

First, the private interest involved in this case is *not* the right to "continued" enjoyment of a benefit or entitlement such as the Court has addressed in its prior decisions. *E.g.*, *Atkins* v. *Parker*, 472 U.S. 115, 128 (1985); *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 538 (1985); *Goldberg* v. *Kelly*, 397 U.S. 254, 261-264 (1970). Instead, this case involves merely the right to apply for an initial determination of eligibility. This Court has never held that an *applicant* for a government benefit has a "property" interest to which due process protections could be said to apply.[2] See *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985). Even if such an interest does exist, it is clearly of a different magnitude from that of a person who is challenging the termination of a benefit to which he has previously been determined to be eligible. See *Mathews* v. *Eldridge*, 424 U.S. at 341. Moreover, the initial determination of an application for eligibility is made in a "non-adversary" hearing (*id.* at 339), where the interest of both the applicant and the government is that of obtaining "accuracy and

[2] Nor was this question presented or addressed in the courts below in this case.

promptness" in the decision. *Califano* v. *Boles*, 443 U.S. 282, 285 (1979). The procedures, if any, required by the guarantee of due process should be designed to foster, not burden, those objectives.

Second, it cannot be said that an "absolute right" to subpoena and orally examine every reporting physician in a disability case will meaningfully reduce the risk of erroneous determinations of eligibility. The Social Security Act expressly authorizes the agency to consider evidence that would be "inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. 405(b)(1). The Court has thus recognized that the agency may properly receive and consider hearsay evidence, including written medical reports, that would be excluded if offered in a court of law. See *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971). The Court similarly has observed that a determination of "physical * * * condition" is a "more sharply focused and easily documented decision than the typical determination of welfare entitlements" and that the potential value of an "oral presentation to the decisionmaker" is accordingly less. *Mathews* v. *Eldridge*, 424 U.S. at 343, 344. Where, as here, an administrative decision is one that properly can be made on the basis of written reports, this Court has held that the opportunity to appear and present one's own evidence "adequately safeguards against serious risks of error." *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 15 (1979). Under the Social Security Act and its implementing regulations, the government has afforded disability applicants the right to appear and present their evidence (42 U.S.C. 405(b)(1)) as well as the opportunity to obtain a subpoena to compel testimony of other witnesses upon a showing that the evidence is "reasonably necessary"

to the applicant's case. 20 C.F.R. 404.950(d)(1); see 42 U.S.C. 405(d).[4] Due process surely does not require more, for a procedure for obtaining evidence that is *not* "reasonably necessary" to the case could not reasonably be said to reduce meaningfully the risk of an erroneous administrative decision. See *Mathews* v. *Eldridge*, 424 U.S. at 335.

Moreover, the court of appeals gave no consideration whatever to the enormous administrative burden that an "absolute right" to subpoena every reporting physician would create. This Court has emphasized that the "magnitude of [the task of administering the federal disability benefits program] is not amenable to the full trappings of the adversary process lest again benefit levels be threatened by the costs of administration." *Califano* v. *Boles*, 443 U.S. at 285. If an "absolute right" to subpoena reporting physicians exists for each of the "[m]illions of claims * * * filed every year" (*Schweiker* v. *Chilicky*, 487 U.S. at 424), the additional delays and costs imposed on the administration of the program would be staggering. While these additional costs may not be of "controlling weight in determining whether due process requires a particular procedural safeguard * * *, the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Mathews* v. *Eldridge*, 424 U.S. at 348.

2. Instead of conducting the due process analysis required by this Court's decisions, the court of appeals concluded (App., *infra*, 4a) that an "absolute

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[4] Moreover, as the facts of this case reflect, the applicant is also permitted to depose the reporting physician by written interrogatories and thereby probe for potential errors in the report.

right" to subpoena reporting physicians in disability cases had already been established by *Richardson* v. *Perales*. In *Perales*, this Court held that a written report of a physician could be received as evidence by the agency in a disability hearing, and could constitute "substantial evidence" upon which the agency may rely in forming its decision, even though the physician did not personally appear at the hearing to sponsor the report by oral testimony. 402 U.S. at 402. In reaching that decision, the Court emphasized the "underlying reliability and probative value" of such written medical reports and the lack of bias in the work of "these independent physicians." The Court also noted that the agency proceeding is not adversary in nature, that the written reports are prepared by "specialists concerning a subject whom they had seen," that "written medical reports" have been admitted "even in formal trials * * * as an exception to the hearsay rule," and that "the cost of providing live medical testimony" at thousands of disability hearings each year "would be a substantial drain on the trust fund and on the energy of physicians already in short supply." *Id.* at 402-406.

The Court in *Perales* did not address the question whether the Due Process Clause established an "absolute right" to subpoena the reporting physician. The Court was aware, however, that the agency's regulations authorized issuance of a subpoena upon a showing of reasonable necessity for the evidence. See 402 U.S. at 397 (a "claimant may request the issuance of subpoenas"), citing 20 C.F.R. 404.926 (1970) (subpoenas may be issued if "reasonably necessary for the full presentation of a case"), recodified as 20 C.F.R. 404.950(d)(1). The fact that the applicant could obtain oral testimony upon a showing of "need" through the agency subpoena proc-

ess was deemed important in *Perales*, for the Court stressed that the use of a physician's written report without oral testimony was proper in those situations "where need [for oral testimony] has not been demonstrated by a request for a subpoena." 402 U.S. at 406.

The court of appeals mistakenly read *Perales* to require that subpoenas be granted without a demonstration of "need." Both by its express terms and by its reference to the agency subpoena process, *Perales* indicates that subpoenas are required only when "need" has "been demonstrated by a request for a subpoena." 402 U.S. at 406. As the Fourth Circuit stated in *Souch* v. *Califano*, 599 F.2d 577, 580 n.5 (1979), when this Court "spoke [in *Perales*] of a claimant's 'right' to subpoena, we think the reference was to his right to *request* issuance of a subpoena—not his absolute right to have a subpoena issued upon request."

3. The decision of the court of appeals in this case is in conflict with the decisions of other courts of appeals. The decision of the court below contradicts the decisions of the Third Circuit in *Wallace* v. *Bowen*, 869 F.2d 187, 193 (1988),[5] and the Fourth Circuit in *Souch* v. *Califano*, 599 F.2d at 580 n.5, and *Taylor* v. *Weinberger*, 528 F.2d 1153, 1156 (1975), which have squarely rejected the concept of

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[5] In *Wallace* v. *Bowen*, the Third Circuit held that due process requires that subpoenas be allowed by the agency when "cross-examination is necessary to the full presentation of the case." 869 F.2d at 193. This decision merely requires what the agency's regulations (20 C.F.R. 404.950(d)(1)) had long provided. The Fifth Circuit erroneously cited *Wallace* v. *Bowen* as support for its holding that applicants for disability benefits have an "absolute right" to subpoena reporting physicians. See App., *infra*, 4a.

an "absolute right" to subpoena the reporting physiclaim for a disability benefits hearing. See also *Berger* v. *Secretary of HHS*, 835 F.2d 635, 640-641 (6th Cir. 1987).[6] While several of the decisions relied on by the court of appeals in this case plainly do not support an "absolute right" to subpoena reporting physicians,[7] the decision of the Eighth Circuit in *Coffin* v. *Sullivan*, 895 F.2d 1206, 1212 (1990), properly may be read to be consistent with such a holding (see App. 4a).

In short, the courts of appeals have not spoken with a single voice on the subject. A clear conflict now exists among their decisions. This conflict will inevitably cause confusion and inefficiency in the national administration of the federal disability benefits program. The conflict should therefore be resolved by this Court.

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[6] In *Wallace* and *Souch*, the court held that a request for a subpoena had been improperly denied, but did so on the basis that the requisite showing of need had been made. In *Berger*, the court upheld the administrative law judge's refusal to subpoena an agency employee (who had initially denied the application for retirement benefits) on the ground that the requisite showing of need had not been made.

[7] See note 5, *supra*. *Figueroa* v. *Secretary of HEW*, 585 F.2d 551, 554 (1st Cir. 1978), and *Townley* v. *Heckler*, 748 F.2d 109, 114 (2d Cir. 1984), on which the court of appeals relied (App., *infra*, 4a), refer simply to an applicant's right to "cross examine," without considering or resolving the issue presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1158

Summary Calendar

NELLEY LIDY, JR., PLAINTIFF-APPELLANT

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

Sept. 17, 1990

BEFORE GEE, SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

I.

The plaintiff, Nelley Lidy, Jr., appeals the district court's grant of summary judgment upholding the denial by the Secretary of Health and Human Services of Lidy's application for disability insurance benefits. The factual issue regarding Lidy's entitlement to benefits is whether he suffers disabling pain. On this point, the following witnesses testified: Lidy, his wife, Dr. Berg, Dr. Morgan and Dr. Finney. The

reports of Dr. Finney, to whom Lidy's workers' compensation insurer referred him, formed the basis of the administrative law judge's (ALJ's) finding of no disability.

In order to challenge Dr. Finney's report, Lidy sought to subpoena him for cross-examination. The ALJ refused Lidy's request but did permit him to submit a set of written interrogatories to Dr. Finney. Finding the doctor's answers to be vague and evasive, Lidy sought to submit a second set of interrogatories and to reurge his request for live cross-examination. The ALJ denied Lidy's request, stating that additional interrogatories would not be helpful.

In the district court, the magistrate recommended granting Lidy's motion for summary judgment on the ground that the ALJ's refusal to permit Lidy to cross-examine Dr. Finney constituted a denial of due process. The district court, however, sustained the Secretary's objections to that finding and held that the ALJ acted within his discretion; the court accordingly granted summary judgment in favor of the Secretary.

II.

In concluding that Lidy has a right to cross-examine Dr. Finney, the magistrate relied upon *Richardson v. Perales*, 402 U.S. 389, 402, 91 S.Ct. 1420, 1428, 28 L.Ed.2d 842 (1971):

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the

> claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, *when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.* [Emphasis added.]

Lidy maintains that this holding recognizes an absolute right to cross-examine such a physician when a subpoena has been sought.

The Secretary argues, first, that *Perales* addresses the scenario of a *nonexamining* physician, whereas here Dr. Finney in fact had examined Lidy. However, the passage from *Perales* that we have quoted, *supra*, plainly refers to *examining* physicians. Hence, this argument by the Secretary is without merit.[1]

Second, the Secretary observes that, in what he acknowledges is dictum, the Court in *Perales* referred to "the cost of providing live medical testimony . . . where need has not been demonstrated by a request for a subpoena." *Id.* at 406, 91 S.Ct. at 1430. It is not pellucid from this passage, standing alone, whether the Court mean that the request must contain sufficient demonstration of need (the interpretation undoubtedly supported by the Secretary) or merely that the filing of a request *ipso facto* constitutes a demonstration of need.

We note, however, that later in its opinion the Court refers to "the use of the subpoena and consequent cross-examination," *id.* at 410, 91 S.Ct. at 1431,

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[1] The Secretary also suggests that the rule should be different for a doctor who, like Dr. Finney and unlike the doctor in *Perales*, is a *treating* physician. However, nothing in *Perales* supports that distinction.

suggesting that such cross-examination necessarily follows from the filing of a request for a subpoena. We also observe that in the major passage at issue, the Court refers to the "right to subpoena," *id.* at 402, 91 S.Ct. at 1427-28, not merely the "right to request a subpoena," thus implying that the entitlement is automatic. Thus, we conclude that the better reading is that by requesting a subpoena, a claimant has the right to cross-examine an examining physician.

In accordance with the view that the right to subpoena is qualified, the Secretary has promulgated 20 C.F.R. § 404.950(d), permitting an ALJ to refuse a request for a subpoena of a witness whose testimony is not "reasonably necessary for the full presentation of the case," a showing that Lidy failed to make. In view of our conclusion that Lidy's request should have been honored, we need not address this point further.

We are persuaded, as well, by the fact that all of the circuit courts of appeals that have addressed this issue read *Perales* as conferring an absolute right to subpoena a reporting physician. "Due process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals who submit reports." *Coffin v. Sullivan*, 895 F.2d 1206, 1212 (8th Cir. 1990). "We construe [*Perales*] as holding that an opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled. . . ." *Wallace v. Bowen*, 869 F.2d 187, 192 (3d Cir.1989). *Accord Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir.1984). *See Figueroa v. Secretary of Health, Education & Welfare*, 585 F.2d 551, 554 (1st Cir.1978) ("right to cross-examine"). We see no reason to create a split among the circuits on this issue by differing with these persuasive authorities.

Accordingly, we VACATE and REMAND to the district court for further proceedings in light of our determination that Lidy was entitled to cross-examine Dr. Finney.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AMARILLO DIVISION

No. CA-2-85-0322

NELLEY LIDY, JR., PLAINTIFF

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANT

[Filed Feb. 22, 1990]

Came on to be heard the above-referenced and numbered cause in which plaintiff and defendant have both filed motions for summary judgment.

The Report and Recommendation of the United States Magistrate was filed October 27, 1989, and objections to the Report and Recommendation have been filed by defendant, Secretary of Health and Human Services within the time limits allowed by the Report and Recommendation. The Court has considered the Report and Recommendation of the United States Magistrate, has made an independent examination of the objections of defendant to the Magistrate's Report and Recommendation, and has exam-

ined the administrative records and pleadings on file in this case. The matter is presented to the District Court for a *de novo* review. Based upon the objections to the Report and Recommendation filed by the defendant Secretary of Health and Human Services, the Court is of the opinion such objections should be SUSTAINED, and that the Report and Recommendation should not be adopted. The summary judgment should be and is hereby GRANTED in favor of defendant Secretary of Health and Human Services.

The Court has considered whether the objections to the Report and Recommendation filed by the defendant Secretary of Health and Human Services should be allowed. The defendant did not, in its memorandum in support of its motion for summary judgment, address the due process arguments set forth in plaintiff's motion other than citing the Court to *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) which the Magistrate has held to be inapplicable to the facts of this case and with which determination the Court agrees. In objecting to the Report and Recommendation of the Magistrate the defendant has in fact supplemented its legal argument extensively. All of the matters contained in the defendant's objections could have been brought to the attention of the Court prior to the issuance of the Report and Recommendation by requesting leave to file a responsive pleading to plaintiff's motion for summary judgment. In the future the Secretary should seek to bring these matters to the attention of the Court prior to the issuance of a Report and Recommendation.

It is the opinion of the Court based upon a review of the objections filed and the cases cited therein, that the denial of plaintiff's request to cross-examine Dr.

Finney was a matter within the discretion of the Administrative Law Judge, was not clearly erroneous or an abuse of discretion and therefore the reports of Dr. Finney should be considered as evidence at the administrative level and being so considered constitute substantial evidence in support of the decision of the defendant denying benefits to plaintiff. Defendant's objections to the Magistrate's Report and Recommendation are therefore SUSTAINED.

Accordingly, plaintiff's motion for summary judgment should be and is hereby DENIED. Defendant's motion for summary judgment should be and is hereby GRANTED for the reasons set forth in this Order.

IT IS SO ORDERED.

ENTERED this 21st day of February 1990.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

No. CA-2-85-0322

NELLEY LIDY, JR., PLAINTIFF

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

JUDGMENT

[Filed Feb. 22, 1990]

Of equal date herewith, the Court has entered an Order Granting Summary Judgment for defendant in the above-styled and numbered case.

JUDGMENT IS ENTERED ACCORDINGLY,

IT IS THEREFORE ORDERED and DECREED that the Motion for Summary Judgment filed by defendant SECRETARY OF HEALTH AND HUMAN SERVICES, is GRANTED, and the Motion for Summary Judgment filed by plaintiff Nelley Lidy, Jr., is DENIED. Judgment is entered for defendant.

The Clerk shall mail a copy of this Judgment to all counsel of record.

IT IS SO ORDERED.

ENTERED this 21st day of February 1990.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AMARILLO DIVISION

No. CA-2-85-0322

NELLEY LIDY, JR., PLAINTIFF

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

REPORT AND RECOMMENDATION

[Filed Oct. 27, 1989]

Plaintiff NELLEY LIDY, JR., brought this action under the Social Security Act. Plaintiff is seeking review of a final decision of the Defendant/Secretary of Health and Human Services denying his claim for a period of disability and for disability insurance benefits.

Plaintiff LIDY filed his claim for disability benefits which is the subject of this action on July 9, 1982 (Tr. 320).[1] Plaintiff's application was denied initially and upon reconsideration (Tr. 324-337). A hearing was held before an Administrative Law Judge on August 4, 1983 (Tr. 62-69). The ALJ issued a deci-

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[1] Plaintiff LIDY had previously filed other applications for disability benefits which were denied by the Social Security Administration at the administrative level. No further action was taken with respect to such applications. The application filed July 9, 1982, alleged an onset of disability of December 1980 due to back trouble.

sion on December 12, 1983, finding plaintiff not to be disabled (Tr. 50). The Appeals Council reversed the decision of the Administrative Law Judge and sent the case to another Administrative Law Judge for a second hearing. A second hearing was held in October 1984 and was attended by plaintiff, his wife, his counsel, and a vocational expert (Tr. 93-130). After the second administrative hearing, the ALJ found plaintiff not to be disabled and issued a decision on June 30, 1985 (Tr. 17). The Appeals Council denied review of the ALJ's decision on October 23, 1985 (Tr. 7-8). Plaintiff timely commenced this action for judicial review on November 20, 1985.

After filing for judicial review, the parties submitted a joint motion for remand, and on March 5, 1986, this matter was remanded to the Secretary pursuant to Section 5 of the Social Security Benefits Reform Act of 1984. The case was referred to an Administrative Law Judge (Tr. 492). After evaluation of plaintiff's mental impairment under new regulations was completed, the ALJ issued a decision on July 21, 1986, finding plaintiff not be be disabled (Tr. 475-491). On April 22, 1987, the Appeals Council adopted the decision of the Administrative Law Judge with some modifications. Such decision, finding plaintiff not to be disabled, became the final decision of the Secretary (Tr. 452-464).

I.

Statement of Facts

Plaintiff NELLEY LIDY, JR., has undergone three (3) separate back operations. Plaintiff previously filed applications for benefits which were denied by the Administrative Law Judge and ter-

minated at the administrative level. Plaintiff LIDY was gainfully employed on July 9, 1982, when the application for disability at issue was submitted to the administration. On July 13, 1982, plaintiff suffered an on-the-job injury, which injury eventually resulted in plaintiff's undergoing a third back operation.

There is some dispute as to the plaintiff's educational and literacy record. Plaintiff was born December 17, 1935, and according to plaintiff's testimony, dropped out of school in the third grade (Tr. 69), although plaintiff, on a hearing request form, stated he had completed the fourth grade (Tr. 344). There is additional evidence in the record reflecting plaintiff was promoted to the sixth grade (Tr. 447), and maintained a C to C— average in the fifth grade. Such exhibit also contains the notation that the promotion to the sixth grade may have been on the basis of age equivalence. For purposes of this review, the classification of plaintiff at the educational level of limited or less as opposed to plaintiff's contention of illiteracy is not critical. The Defendant/Secretary contends such determination would not and did not affect the finding of not disabled since a person with the plaintiff's residual functional capacity of a limited range of light work would be, according to the testimony of the vocational expert and based upon the criteria set forth in the decisions of the Administrative Law Judge and Appeals Council, found not disabled whether the educational level was illiterate or was found to be limited or less. Plaintiff, in his Memorandum in Support of Motion for Summary Judgment, does not point to anything under Ground of Error No. 1 on the substantiality of the evidence to rebut the Defendant/Secretary's contention.

Plaintiff has previous work experience as a farmer, service station attendant, mechanic, steamer, drill press operator, bulldozer operator, and his most recent employment was as a mechanic.

Plaintiff was working at an automobile dealership as a mechanic at the time he filed his application for disability on July 9, 1982, was employed on that date, and his claim was initially denied based upon his being employed at the time he submitted his claim. Plaintiff filed a request for reconsideration of his claim on October 22, 1982 (Tr. 328), reflecting that on July 13, 1982, he suffered an on-the-job injury and had not worked since the date of his injury.

II.

Medical History

Following his injury in July 1982, plaintiff was treated by Louis A. Finney, M.D. Apparently Dr. Finney treated plaintiff for a back muscle pull or strain until a CAT scan revealed a lower back nerve root compression at L4-L5 and L5-S1. Dr. Finney referred plaintiff to Howard Berg, M.D., for consultation (Tr. 364-366). Dr. Berg, on November 29, 1982, found, prior to any surgery, that as a result of the July 13, 1982, injury, plaintiff suffered a permanent impairment of the functioning of his spine of twenty-five percent (25%). Dr. Berg further found plaintiff could return to limited work on December 3, 1982, with a lifting limit of thirty (30) pounds, and with a limitation on kneeling, stooping, or bending. Dr. Berg found plaintiff's sitting should be limited to one (1) hour per day, but found he could do a job with unlimited walking (Tr. 374). Plaintiff's medical treatment continued past Decem-

ber 1982, however, and eventually Dr. Berg performed back surgery upon plaintiff for disc removal and an L5-S1 fusion on July 5, 1983 (Tr. 391-392). Following the back surgery, Dr. Berg, on August 30, 1983, advised plaintiff LIDY to have an overall twenty-five percent (25%) permanent physical impairment as a result of his spinal injury, advised plaintiff's chances of a solid fusion to be quite good, but *advised the prognosis as to whether the fusion would provide significant pain relief in the future to be guarded*, (Tr. 382), (emphasis supplied).

Plaintiff continued to be seen by Dr. Finney, and reports were submited by Dr. Finney regarding plaintiff in August 1983, September 1983, October 1983, February 1984, and March 1984 (Tr. 388-393). On March 28, 1984, Dr. Finney released plaintiff LIDY to return to gainful employment. Dr. Finney found plaintiff's general physical examination to be within normal limits, found there to be no tenderness in the lumbar region, and found straight leg raising negative at ninety degrees (90°) bilaterally. Further, Dr. Finney found there to be no paraspinous muscle spasm or tenderness, but did find there to be some discomfort in the left sciatic notch region (Tr. 388).

Following the first administrative hearing, plaintiff was referred to Howard W. Morgan, M.D., for an examination on May 15, 1984. Dr. Morgan reported plaintiff had objective mechanical and neurological changes, and did have a reason for seeking disability coverage and being unable to work (Tr. 385). Dr. Morgan reported in a medical assessment of ability to do work related activities that plaintiff would have difficulty sitting for any prolonged period of time, and it was doubtful plaintiff could do much lifting at all. Dr. Morgan reported plaintiff could probably

carry small non-heavy items, but prolonged standing would not be possible, nor would long walking or prolonged weight-bearing, although the plaintiff could walk for short distances. Dr. Morgan further reported plaintiff should be able to handle objects with his hands, but would not be able to bend very much at all, and would not be able to push or pull. Dr. Morgan found no environmental restrictions on the plaintiff, nor did he find any limitation on plaintiff's seeing, hearing, or speaking.

III.

Five Step Process

Pursuant to the statutory provisions, the Defendant/Secretary has promulgated regulations that establish a five-steup sequential process for determining the presence of disability that will award or deny disability payments, 20 C.F.R. 404.1520 (1984).

All of the various regulatory definitions, etc., appear in 20 C.F.R. 404.1501, Subpart P, et seq. The plaintiff bears the burden of proving the first four (4) sequential steps in the test for disability. Then on the final step, if it is reached, the Defendant/Secretary bears the burden of proof.

First Step

The first step is that the plaintiff, at the time of the claim for disability, must not be engaged in substantial gainful activity. If plaintiff is engaged in substantial gainful activity, then the plaintiff is not disabled, 20 C.F.R. 404.1520(b), 404.1510, and 404.1572.

Second Step

If the Administrative Law Judge determines that plaintiff is not engaged in substantial gainful activity, the second determination is to decide if there is an impairment and if it is severe, 42 U.S.C. 423 (d)(2)(A). If the plaintiff does not have both an impairment and a severe one, there is no disability, 20 C.F.R. 404.1520(c), 404.1508, 404.1513, 404.1520-1530, and *Bowen v. Yuckert*, —— U.S. ——, 107 S.Ct. 2287 (1987).

Third Step

The Defendant-Secretary has published certain tables and grids for determining a *per se* disability, Appendix 1, Subpart P, 20 C.F.R. 404.1525. If the grid or table shows that the plaintiff is disabled, then the inquiry ends and the plaintiff is entitled to disability benefits, *Heckler v. Campbell*, 461 U.S. 458 (1983). However, if the grid or table does not show a *per se* disability, it does not result in a final determination of a disability, 20 C.F.R. 404.1520(d).

Fourth Step

The fourth step is to determine whether plaintiff's present impairment prevents the performance of past relevant work. If the plaintiff has a severe impairment that is not *per se* disabling, and the plaintiff is capable of doing past relevant work, there is no disability, 20 C.F.R. 404.1520(e).

Fifth Step

On the final step, the burden of proof is on the Defendant/Secretary. The determination to be made is if the severe impairment prevents the plaintiff

from performing any work, whether it be medium, light, or sedentary. At this step, the residual functional capacity, the age, education, and past work exjerience of the plaintiff are to be considered, 20 C.F.R. 404.1520(f), 404.1545-1568. If it is determined that the plaintiff is limited to sedentary work, then the Administrative Judge is required to refer to Table No. 1, Appendix 2, Subpart P, 20 C.F.R. 404.1569, to determine if, under his residual functional capacity with his severe medically determinable impairments, he is disabled. If the determination is that the plaintiff can perform light work, the Administrative Law Judge refers to Table No. 2, *supra*. Table No. 3, *supra*, is utilized for medium work.

The five step sequential test has been discussed and judicially approved many times, *Martin v. Heckler*, 754 F.2d 1262 (5th Cir. 1984). The standard by which the decision of the Administrative Law Judge is review is that of "substantial evidence." If the decision of the Secretary is supported by substantial evidence, then the decision will be affirmed. Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Conversely, to make a finding of "no substantial evidence" to justify reversal of the Administrative Law Judge's decision, it must be concluded that there is a "conspicuous absence of credible choices," or "no contrary medical evidence," *Dellolio v. Heckler*, 705 F.2d 123, 125 (5th Cir. 1983).

IV.

Positions of the Parties

In support of his Motion for Summary Judgment and appeal of the administrative decision, plaintiff

sets forth three (3) issues. In Issue 1, plaintiff contends the final decision of the Defendant/Secretary of Health and Human Services is not supported by substantial evidence. In Issues 2 and 3, plaintiff challenges the procedural aspects of the administrative process alleging a denial of due process, in that he was not permitted to cross-examine Dr. Louis A. Finney (Issue 2), and that he was denied due process of law when his prehearing discovery request to learn the proposed testimony from the vocational expert was denied by the Administrative Law Judge (Issue 3).

The defendant asserts no violations of due process occurred, and that the decision of the Defendant/Secretary is supported by substantial evidence.

A.

Existence or Nonexistence of Substantial Evidence

Plaintiff first contends the back impairment from which he suffers constitutes a listed impairment under 20 C.F.R., Subpart B, Appendix 1, Section 1.05, of the Social Security Regulations. Plaintiff does not provide any argument or citation to the record in support of his contention that the plaintiff's impairment constitutes a per se disability as a listed impairment under Section 1.05 of the regulations. It is therefore the opinion and RECOMMENDATION of the Magistrate to the United States District Judge that plaintiff has failed to show himself to be suffering from a per se disability in this appeal.

Plaintiff further contends his Motion for Summary Judgment should be granted in that, not only is there not substantial evidence in support of the Secretary's decision, but there exists compelling evidence in support of a finding of disability. Specifically, plaintiff

contends there to be compelling evidence that he suffers excruciating pain each and every time he attempts vigorous physical work. At page 12 of his Brief in Support of Motion for Summary Judgment, plaintiff lists ten (10) medical signs which could reasonably be expected to support plaintiff's testimony concerning disabling pain.

The question for this Court, however, is not whether there is substantial evidence in the record to support a finding of disability, had one been made, but whether there is substantial evidence in the record to support the finding of nondisability at the administrative level. The Administrative Law Judge in this case found the plaintiff to be capable of performing a limited range of light work. The ALJ also found plaintiff's subjective complaints of pain not to be sufficiently credible to support a finding the pain described prevents the claimant from engaging in substantial gainful activity. *Deters v. Secretary*, 789 F.2d 1181, 1185 (5th Cir. 1986), provides an administrative decision of "not disabled" should be affirmed if there is substantial evidence in support of such decision, and that the District Court is not to make a *de novo assessment*. Even if this Court were to determine from the evidence a different result should be reached, or be of the opinion a finding of "disabled" would have been proper, this Court may not substitute its judgment for that of the Secretary provided there is substantial evidence in support of the decision of the Secretary.

The most significant evidence in support of the Secretary's finding of not disabled is the medical evidence from Dr. Finney. Plaintiff attacks the opinions rendered by Dr. Finney and challenges the determinations made. Interrogatories were posed to Dr. Finney,

and as a result of such interrogatories, Dr. Finney explains his findings and the reasons for reaching his opinions concerning plaintiff's condition and plaintiff's subjective complaints of pain. It is clear the testimony of plaintiff regarding the pain he is suffering is very much in conflict with the opinions of Dr. Finney. The credibility of the witnesses and weight to be given the testimony and evidence of various witnesses, however, is a matter within the discretion of the fact-finder, here the Administrative Law Judge.

Before this Court could find the decision of the Secretary not to be supported by substantial evidence, the findings and opinions of Dr. Finney must either be disregarded or must be found not to constitute credible evidence. The opinions and findings of Dr. Finney, although vigorously challenged by plaintiff, do provide medical evidence in support of the decision of the Secretary. Specifically, Dr. Finney, in March 1984, released plaintiff to return to work. Further, as he explained in his medical findings and letters in the administrative record, and as set forth in his answers to interrogatories, Dr. Finney determined the plaintiff not to be in pain or distress to the extent such would be disabling. Although it is entirely possible and feasible the Secretary could have reached an opposite result and found plaintiff, based upon his subjective complaints of pain, the testimony of plaintiff's wife, the opinions of the consulting physician, Dr. Morgan, and the back operations to which plaintiff submitted, to be disabled, Dr. Finney provides evidence in opposition to such a finding.

It is the opinion of the Magistrate the finding by Dr. Finney and the opinions rendered by Dr. Finney, if found to be credible evidence, would constitute sufficient substantial evidence in support of the decision of

the Secretary to cause plaintiff's Motion for Summary Judgment to be denied on the substantiality of the evidence issue. For the reasons recited below under the due process issues, however, the Court questions whether or not Dr. Finney's findings can be considered as credible evidence, and therefore, it is the opinion of the Magistrate that defendant's Motion for Summary Judgment must be DENIED.

B.

Due Process Objections

In addition to his first ground of error, plaintiff raises two (2) points alleging a denial of procedural due process in support of his Motion for Summary Judgment. First, plaintiff alleges the refusal of the Administrative Law Judge to allow a second set of interrogatories to be served on Dr. Finney and/or the refusal of the ALJ to subpoena Dr. Finney to appear and be available for cross-examination denied plaintiff procedural due process as required by *Richardson v. Perales*, 402 U.S. 389, 28 L.Ed.2d 842, 91 S.Ct. 1420 (1971).

Secondly, plaintiff alleges under point 3 that he was denied procedural due process of law in that he was not permitted prehearing discovery to determine the occupational testimony of the vocational expert at the October 24, 1984, hearing.

The Magistrate is of the opinion that plaintiff's procedural due process deprivation argument must fail as to the vocational expert. Plaintiff was provided an opportunity to question and cross-examine the vocational expert at the administrative hearing in October 1984. Prior to the vocational expert testifying, plaintiff's counsel objected to such testimony on

the basis of plaintiff being deprived of an opportunity for discovery from the vocational expert, which objection was overruled by the Administrative Law Judge (Tr. 121). The vocational expert based his opinions in substantial part upon the evidence offered at the administrative hearing. From the testimony of the vocational expert, Mr. Breedlove, it appears that he had not formulated the exact job availability testimony which was offered until the time of the administrative hearing (Tr. 127).

In support of his contention that he should have been allowed prehearing discovery from the vocational expert, plaintiff cites *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). *Jencks*, however, is not applicable. *Jencks* concerned the production of previous statements given by witnesses who testified in a criminal case against the defendant. *Jencks* did not concern discovery at the administrative hearing level. The plaintiff also cites *Harvey Aluminum (Inc.) v. National Labor Relations Board*, 335 F.2d 749 (9th Cir. 1964). *Harvey Aluminum*, as did *Jencks*, concerns the production of prior statements of witnesses who testified at a hearing before the National Labor Relations Board, and did not concern prehearing discovery of possible or potential matters about which a particular witness might testify.

The vocational expert in this case, Mr. Tom Breedlove, testified at the administrative hearing on disability. The witness was available for cross-examination by plaintiff, and plaintiff has failed to show any resulting denial of due process. The Magistrate is of the opinion and RECOMMENDS to the United States District Judge that no denial of due process occurred with respect to the testimony of

the vocational expert, and that plaintiff's Point of Error Number 3 should be OVERRULED.

Plaintiff's Point of Error Number 2 concerning his request for a subpoena for Dr. Finney and/or his request to submit a second set of interrogatories to Dr. Finney presents a more substantial due process question.

Richardson v. Perales, at 91 S.Ct. 1482, provides a written report by a licensed physician who has examined the claimant and which sets forth the physician's medical findings may be received as evidence in a disability hearing, despite its hearsay character and despite the absence of cross-examination, such report may constitute substantial evidence supporting a finding by the hearing examiner adverse to the claimant *when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician* (emphasis supplied).

While the record in this case is not absolutely complete, and does not absolutely reflect plaintiff subpoenaed Dr. Finney, the record does reflect plaintiff requested a subpoena issue to Dr. Finney. At the hearing on October 24, 1984, the ALJ stated:

> You have got a right--the claimant has a right to cross examine the witness. There is no question about that and the Appeals Council requested that we obtain this information from Finney and we go the information and now counselor wants to cross examine him. You have got the right to do that. I would suggest he does it—submit in the form of interrogatories—if the interrogatories does not appear to satisfactorily answered—maybe not to the claimant's benefit, but I'll decide that too if you will submit the

> interrogatories and I feel like the doctor did not satisfactorily fully answer them. I'll certainly—you have the right to go further with it.

(Tr. 99)

There is additional discussion before the hearing (Tr. 98) where the question of subpoenaing Dr. Finney is raised and the Administrative Law Judge advises the Secretary does not have the authority to subpoena without paying, and plaintiff would have to arrange some fee. The Administrative Law Judge also seemed to suggest to plaintiff's counsel that if interrogatories were not satisfactory, then authority could be granted counsel to question Dr. Finney at deposition, to which plaintiff's counsel advised such would be fine (Tr. 96).

While it is not absolutely clear whether plaintiff's counsel must obtain leave of the ALJ to subpoena the witness to the administrative hearing or is entitled to have such subpoena issued and served on his own, the government does not raise any issue on that point. It is clear plaintiff's counsel indicated by letter dated October 19, 1984, that he wished to cross-examine Dr. Finney, and if arrangements could not be made for Dr. Finney's presence at the hearing on October 24, 1984, that a continuance of the hearing would be agreeable to plaintiff. It is also clear plaintiff's counsel requested the right to cross-examine Dr. Finney at the hearing, and that such request, while perhaps not explicitly denied by the Administrative Law Judge, was implicitly overruled by the suggestion by the Administrative Law Judge that interrogatories be used or that leave to take Dr. Finney's deposition could be obtained.

The government responds to plaintiff's due process violation allegation citing *Mathews v. Eldridge*, 424

U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), for the proposition that in assessing what process is due, substantial weight must be given to the good-faith judgments of the individuals charged with the administration of the social welfare programs. The government submits that further examination of or interrogatories to Dr. Finney are not necessary in that the Administrative Law Judge noted in June 1985 that Dr. Finney had provided thorough answers to the interrogatories submitted by plaintiff, and that further inquiry was not only unnecessary, but would border on harassment (Tr. 22). The Secretary has cited no authority other than *Mathews v. Eldridge*. The Magistrate agrees with plaintiff's counsel that *Mathews v. Eldridge* is distinguishable from *Richardson v. Perales*. The issue addressed in *Mathews* concerned whether an evidentiary hearing was required prior to the termination of social security benefits. The issue discussed in *Richardson v. Perales* concerned whether an evidentiary hearing was required prior to the termination of social security benefits. The issue discussed in *Richardson v. Perales* concerned whether a hearsay statement by a consultive physician could constitute substantial evidence in support of a finding of nondisability. The Court, in *Richardson v. Perales*, ruled that it could where the claimant had not sought to subpoena the witness in question.

The government has not challenged plaintiff's citation of *Richardson v. Perales*, and has not challenged procedurally plaintiff's request for a subpoena to Dr. Finney in order that cross-examination might be had. It is the finding of the Magistrate that plaintiff's counsel did make a valid and timely request for cross-examination prior to the administrative hearing in October 1984, and made a valid and timely request

to depose Dr. Finney. It is the further finding of the Magistrate that, by his letter of March 8, 1985, the Administrative Law Judge denied plaintiff's request for further interrogatories (Tr. 436). The record reflects, by letter of November 8, 1984, plaintiff's counsel requested a subpoena issue to Dr. Finney for deposition (Tr. 440), and in a letter of October 19, 1984, plaintiff requested a subpoena issue to Dr. Finney requiring his presence at the hearing of October 24, 1984 (Tr. 442). The letter of the Administrative Law Judge of March 8, 1985 (Tr. 436), denying plaintiff's request for additional interrogatories to Dr. Finney, must also be considered as a denial of plaintiff's request to depose Dr. Finney or to have Dr. Finney available at an administrative hearing to testify subject to cross-examination, in that the March 1985 letter denying further interrogatories was in response to plaintiff's counsel's letter of February 28, 1985, which, in addition to requesting additional interrogatories, reiterated plaintiff's objection to being denied cross-examination by deposition or otherwise (Tr. 437).

It is the finding of the Magistrate that the state of the record is as follows. Prior to the October 24, 1984, hearing, plaintiff's counsel requested a subpoena issue to Dr. Finney for the purpose of having Dr. Finney available for cross-examination. At the administrative hearing on October 24, 1984, the Administrative Law Judge discussed the plaintiff's request for a subpoena to Dr. Finney, announced the ALJ's concerns about payments to the doctor, and suggested interrogatories to Dr. Finney be utilized in the alternative. Following such suggestion, the statement of the Administrative Law Judge, which appears to have been somewhat garbled in transcription, but which is quoted at pages 16-17 of this Report and

Recommendation, reflects that although the Administrative Law Judge states he would determine the extent to which the answers to interrogatories are or are not satisfactorily answered, also suggests counsel for plaintiff would have an opportunity to go further with cross-examination by deposition or otherwise. The Administrative Law Judge also states there is no question about it; the claimant has a right to cross-examine the witness (Tr. 99). Assuming a valid and timely request for a subpoena, either for deposition or for the administrative hearing, the question now presented is whether the alternative use of the written interrogatories to Dr. Finney by plaintiff's counsel, even though submitted over plaintiff's counsel's objection and subject to his request for live cross-examination, satisfied procedural due process to the degree that the Administrative Law Judge properly denied plaintiff's further deposition and interrogatory request by his letter denying same on March 8, 1985, or constituted a waiver by plaintiff. It is the opinion of the Magistrate that the government's reliance on *Mathews v. Eldridge* for the general proposition that substantial weight must be given to the good faith judgments of administrative personnel does not provide an exception to the specific language of *Richardson v. Perales.*

It is the determination of the Magistrate, under the facts of this case, where a request to cross-examine the physician, Dr. Finney, was made, and where plaintiff's counsel agreed to the submission of interrogatories at a time when the statements of the hearing examiner indicated further cross-examination by deposition or otherwise to be available, no waiver occurs and the denial of cross-examination constitutes, under *Richardson v. Perales*, a denial of due process at the administrative level.

Consideration of this case along these lines would conform with the language of *Cook v. Heckler*, 750 F.2d 391 (5th Cir. 1985), at 393, where the Court held that if substantial evidence supports the administrative finding, the Court may then only review whether the Administrative Law Judge applied the proper legal standards and conducted the proceedings in conformity with the applicable statutes and regulations.

It is significant that no further discovery whatsoever was allowed, even by additional interrogatories. It appears plaintiff's counsel only sought one (1) additional interrogatory be propounded to Dr. Finney, as contained in his letter of February 28, 1985, to the Honorable Rollie D. Thedford, Administrative Law Judge (Tr. 437-439). Under the facts of this case, where the most substantial if not total evidence supporting the Secretary's decision is that of Dr. Finney, and in light of this Court's determination that the findings of Dr. Finney would constitute substantial medical evidence in support of the decision of the Secretary and that it would have been well within the Secretary's discretion to have found in plaintiff's favor based upon the other evidence adduced at the administrative level, the Magistrate is not able to find the failure to allow further discovery, whether by deposition, additional interrogatories, or otherwise, to have constituted harmless error.

C.

Remand or Summary Judgment in Favor of Plaintiff

Should the District Court adopt the Report and Recommendation of the Magistrate that plaintiff was denied procedural due process at the administrative

level under the circumstances of this case by the failure of the Administrative Law Judge to allow any further inquiry into Dr. Finney's findings, the question remains as to whether such denial of due process results in this Court remanding the case to the Secretary to allow plaintiff's counsel to conduct such further inquiry of Dr. Finney, or whether such finding results in the granting of plaintiff's Motion for Summary Judgment.

Neither party has submitted any authority on this point. Ordinarily, remand would be proper in a case where some error occurred during the administrative process which error would have allowed further development of the plaintiff's evidence. In this case, however, the denial of due process occurred with respect to the witness which provided the most substantial evidence in support of the Secretary's determination. Here, plaintiff was not deprived of producing evidence of his own, but was deprived of his right to attack the credibility of Dr. Finney's findings by attempting to show such findings were based upon information from the plaintiff which had either been misinterpreted by Dr. Finney or misunderstood by Dr. Finney. It may very well have been that Dr. Finney's further testimony would have been contradictory to plaintiff's affidavits and testimony that he did not make certain statements attributed to him by Dr. Finney. Such issue was not allowed to be explored by plaintiff's counsel.

Based upon the language of *Richardson v. Perales*, *supra*, which provides that in order for the hearsay statements of consultive physicians to constitute substantial evidence in support of the decision of the Secretary, and that such reports, although hearsay, can and do constitute substantial evidence, provided

such are material and are subject to the use of subpoena and cross-examination, the Magistrate is of the opinion that, having found a denial of procedural due process in the failure to allow additional cross-examination of Dr. Finney, the hearsay testimony of Dr. Finney cannot be considered as substantial evidence. If the reports and testimony of Dr. Finney are not considered substantial evidence, based upon the due process ruling, then it is the opinion of the Magistrate, such evidence being excluded, that there is not substantial evidence to support the decision of the Secretary of nondisability. The burden of proof is upon the Secretary at the fifth stage of the sequential step process, and the Secretary having failed to carry that burden as a result of Dr. Finney's evidence being excluded, then it is the opinion of the Magistrate that summary judgment should be GRANTED in favor of plaintiff NELLEY LIDY. There is, however, substantial evidence in support of the determination by the Administrative Law Judge that the plaintiff was engaging in substantial gainful activity as of July 13, 1982. It is the opinion of the Magistrate that the Motions for Summary Judgment would define a period of disability only from July 13, 1982.

It is acknowledged that neither party has addressed this specific issue as to whether remand would be proper, or the granting of a Motion for Summary Judgment in plaintiff's favor would be proper, in the event the Court found there to be a denial of due process at the administrative level. All parties will be allowed ten (10) days in which to file objections to this Report and Recommendation. Should the government have authority to the effect remand would be proper as opposed to the granting of plaintiff's Motion for Summary Judgment, such authority should

be brought to the attention of the District Court. By the same token, should plaintiff have authority to the effect the denial of due process at the administrative level results in an exclusion of such evidence, as the Magistrate has found, and therefore, a finding of no substantial evidence in support of the decision of the Secretary, and that plaintiff's Motion for Summary Judgment should be granted, such authority should be submitted to the District Court within the time limit for filing objections to the Report and Recommendation. It is the opinion of the Magistrate that without Dr. Finney, the only remaining evidence in the record is that of the consultive physician, Dr. Morgan, and the testimony of plaintiff and his wife concerning plaintiff's pain and suffering, all of which evidence supports plaintiff's claims of disabling pain.

Based upon all of the foregoing, it is the opinion of the Magistrate and RECOMMENDATION to the United States District Judge that plaintiff's Motion for Summary Judgment for the reasons stated herein be in all things GRANTED, and that defendant's Motion for Summary Judgment be DENIED.

The Clerk is directed to file this Report and Recommendation and to send a copy of it to the attorneys of record for both parties. Any party may object to the proposed findings and to the recommendation within ten (10) days after having been served with a copy hereof, Rule 72, Federal Rules of Civil Procedure, and Rule 4(a)(1) of Miscellaneous Order No. 6, as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas. Such parties shall file with the Clerk of the Court, serve on the Magistrate, and on all parties, written objections which shall specifically identify the portions of the findings, recommendation, or report, to which objection is made, and set out fully the basis

for each objection. The failure to timely file written objections to the proposed findings and recommendation contained in this report shall bar an aggrieved party from attacking the factual findings on appeal, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed. 2d 435 (1985), *reh. den.*, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986), and *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. 1982) (en banc).

IT IS SO RECOMMENDED.

ENTERED this 27th day of October 1989.

/s/ Clinton E. Averitte
CLINTON E. AVERITTE
United States Magistrate

APPENDIX D

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

IN THE CASE OF: NELLEY, LIDY, JR.

Claim for: Period of Disability and Disability Insurance Benefits

440-36-9599

The United States District Court for the Northern District of Texas, remanded this case (Civil Action Number CA-2-85-9322), to the Secretary of Health and Human Services for further administrative action. Thereafter, the Appeals Council remanded the case to an Administrative Law Judge.

On July 21, 1986, a recommended decision was issued to which exceptions have been received.

The Appeals Council hereby modifies the Administrative Law Judge's Psychiatric Review Technique form (PRTF) and the Administrative Law Judge's recommended decision because the PRTF was incomplete and the recommended decision did not adequately reflect the presence of a mental impairment.

The statements in the recommended decision regarding the issue in the case, the applicable regulations and the evidentiary facts are incorporated herein by reference. The sequential evaluation process described in the recommended decision applies to both physical

and mental impairments. In addition, the regulations require that the Appeals Council must also follow a special procedure when evaluating the severity of mental impairments. This special procedure requires the use of the form appended to this decision in all cases in which a mental impairment has been found to exist.

The form is used to list the signs, symptoms and other medical findings which establish the existence of the mental impairment. The medical findings are recorded in one or more of the 8 subsections in Section III of the form. These subsections correspond to the paragraph A criteria for the categories of mental disorders in Appendix 1 of Subpart P, Regulations No. 4 and are known as the "A" criteria.

The form is also used to rate the degree of functional loss resulting from the documented mental impairment(s). There are four areas of function which have been found especially relevant to the ability to work and which correspond to the paragraph B criteria of most of the mental disorders listed in Appendix 1; hence they are known as the "B" criteria. These areas are: activities of daily living; social functioning; concentration, persistence and pace; and deterioration or decompensation in work or work-like settings. The rating for each of these four areas is compared with the criteria set forth in the regulations for determining the severity of the mental impairment.

The medical evidence shows that the claimant does have an affective disorder consistent with some features in section 12.04 of the Listings. The evidence further shows that his mental impairment is only slight and does not significantly limit his ability to do basic work activities.

On February 15, 1985, a panel of the United States Court of Appeals for the Fifth Circuit entered a decision in *Stone v. Heckler*, 752 F2d 1099, in which it held that whenever a decision is issued denying a claim for disability benefits because a claimant did not have a severe impairment, the standard set forth in *Stone* below must be used:

> "An impairment can be considered as not severe only if it is a slight abnormality having such minimal effect on the individual's ability to work irrespective of age, education or work experience."

The Appeals Council has utilized this standard in evaluating the facts in this case relative to the claimant's mental impairment. The Appeals Council concludes the claimant's mental impairment is not severe, i.e., that the claimant has a slight abnormality having such minimal effect that it would not be expected to interfere with the claimant's ability to work irrespective of age, education, or work experience.

The Appeals Council also notes that in completing item Number 4 in the "B" criteria of the Psychiatric Review Technique Form, the Administrative Law Judge indicated that the claimant had had one or two episodes of deterioration or decompensation in work or work-like settings. After reviewing all of the evidence of record, the Appeals Council finds no basis for this conclusion. Therefore, the Council changes item Number 4 of the "B" criteria from once or twice to never.

In a letter/brief dated July 28, 1986, the claimant's attorney contends that the evidence shows the existence of an impairment described in section 1.05 of the Listing of Impairments in Appendix 1, Subpart P, of Regulations No. 4. Counsel also contends that the Administrative Law Judge's recommended findings per-

taining to the claimant's residual functional capacity are not supported by substantial evidence and, in that connection, he further contends that the Administrative Law Judge ignored the effects of the claimant's pain. The Appeals Council notes that these arguments are consistent with arguments previously submitted, particularly those submitted by letter dated August 22, 1985, which has been entered into the record as Exhibit AC-1. Nevertheless, with respect to counsel's contention that the claimant's impairment meets the requirements in section 1.05 of the Listings, the Appeals Council has reviewed the evidence and notes that it does not contain any of the findings specified in that section. The evidence also shows that up to January 26, 1984 the claimant had the residual functional capacity for at least sedentary work, and beginning January 26, 1984 he had the residual functional capacity for light work. The Appeals Council concludes that the Administrative Law Judge adequately discussed the issue of the claimant's pain. The Appeals Council therefore finds counsel's argument not persuasive.

The Appeals Council adopts as herein modified the findings and conclusions in the recommended decision. It is the decision of the Appeals Council that, based on the application filed on July 9, 1982, the claimant is not entitled to a period of disability or to disability insurance benefits under the Social Security Act as amended.

APPEALS COUNCIL

/s/ [Illegible]

/s/ [Illegible]

Date: Apr. 22, 1987

APPENDIX E

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

RECOMMENDED DECISION

IN THE CASE OF: NELLEY LIDY, JR.

Claim for: Period of Disability and Disability Insurance Benefit

440-36-9599

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the

disability insured status requirements of the Act are met for the purpose of entitlement.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 4. The regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.

Social Security Administration Regulations No. 4 requires the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b));

2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c));

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1 of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520 (d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520 (f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a nonexertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

The claimant has filed a number of claims for disability insurance benefits, all of which have been denied, at various levels, prior to the court order remanding this case to the Secretary, hereinafter mentioned. The procedural history of the current application is described, in part, in the following excerpt from a hearing decision issued June 30, 1985, denying the current application:

> "The claimant filed his fourth application for disability insurance benefits on July 9, 1982 alleging disability since December 1980 due to back trouble. The claimant has had two prior hearings resulting in two affirmative decisions. The present application was first denied on September 10, 1982 on the basis that the claimant was engaging in substantial gainful activity. The claimant then submitted proof that he had ceased his work activity and a medical denial was issued on January 4, 1983. The claimant requested a hearing on February 9, 1983; subsequent to this hearing the case was affirmed by Administrative Law Judge's decision dated December 12, 1983. Request for review filed on January 6, 1984 led to the Appeals Council remand order of April 11, 1984."

Such hearing decision of June 30, 1985, denied the claimant's application filed June 9, 1982. The Appeals Council denied a Request for Review thereof, whereupon the claimant appealed to the United States District Court for the Northern District of Texas, Amarillo Division, which court, by its Order dated March 5, 1986, based on a joint motion for remand, remanded this case to the Secretary. Thereafter, the Appeals Council issued its Order dated April 21, 1986, vacating said hearing decision, and its denial of the claimant's Request for Review, and remanded this case to an Administrative Law Judge for further proceedings. Said order of the Appeals Council directs such Administrative Law Judge upon completion of all proceedings to return the case to the Appeals Council with a recommended decision including a completed Psychiatric Review Technique form.

The said hearing decision of June 30, 1985, contains an exhaustive review of: testimony at a hearing held August 4, 1983, and at a supplemental hearing held October 24, 1984; the claimant's work history, as shown in the hearing record; summaries of the content of various medical exhibits in the hearing record; and testimony of a vocational expert relative to the claimant's transferable skills, and, on the basis of a capacity for a limited range of light work (limitations being doing alternate sitting and standing at will), jobs to which such skills are transferable and the existence of such jobs. As no useful purpose would be served by a recapitulation of the same information, reference is made to said prior hearing decision of June 30, 1985, with respect to that portion of the hearing record (as it existed on June 30, 1985) summarized therein.

Such hearing decision of June 30, 1985 further showed the claimant to have met the special earnings requirement of the Act through (at least) December 31, 1983. Inasmuch as the claimant appears to have worked in 1981 and 1982, it is probable that he is insured through the date of this decision, although this is not fully established at this time.

The said prior hearing decision also discusses (p. 3, para. 1) the claimant's work history subsequent to alleged onset date and the evidence showing work at the substantial gainful activity level during most of 1981 and from about March 1982 until July 13, 1982. In view of conclusions herein set out, it is unnecessary to further discuss this matter.

In the opinion of the undersigned, the conclusions stated in said prior hearing decision of June 30, 1985 are fully supported by the evidence summarized

therein, and the hearing record as it presently stands contains no additional evidence which would vary the conclusions therein set out. As shown in said prior hearing decision, the medical evidence establishes that the claimant has a low back pain syndrome and is status post laminectomies and fusion, but that the claimant retains sufficient residual functional capacity for the performance of a limited range of light work, limitations being restriction against lifting over 10 pounds frequently or 20 pounds occasionally, or prolonged sitting, standing, walking or bending. On this basis, the claimant is unable to perform his past relevant work as a mechanic, farmer, self-service station attendant, drill press operator, dozer operator, painter or steamer. However, the applicable vocational rules, used as a framework, require a finding that the claimant is not disabled. In this connection, the testimony of the vocational expert, summarized in the prior hearing decision, shows a transferability of skills along with jobs to which such skills are transferable (and which the claimant is physically able to perform) and the incidence thereof.

Pursuant to the April 21, 1986 Order of the Appeals Council, the undersigned Administrative Law Judge has completed a Psychiatric Review Technique Form which is returned to the Appeals Council along with this decision. As shown on page 8 thereof (IV. Rating of Impairment Severity) there are no signifiant functional limitations resulting from any mental impairment. In this connection, the hearing record contains only oblique references to mental pathology. For example, in Exhibit B-15 (July 1979) the claimant alleges that he is extremely nervous and shakey. On page 286 of the transcript, there is a reference to tension and inability to sleep (August 1979). Page

287 of the transcript mentions "nerves" and "shakiness." Loss of sleep is mentioned on page 293 of the transcript (December 1978). As of May 1979, Dr. Forg recommended a psychologist (transcript, p. 295). Extreme nervousness is mentioned on page 301 of the transcript (January 1980) and "nervousness" is mentioned on page 309 (April 1980). Depressive symptoms and temper troubles are mentioned on page 367 (July 1982). Depression and sleeplessness are mentioned on page 388. The record is devoid, however, of any demonstration, by mental status findings, psychiatric evaluation or psychological testing or otherwise, of significant mental illness. The undersigned Administrative Law Judge believes that the evidence in this regard is accurately reflected in the Psychiatric Review Technique form, which, except for the specific direction by the Appeals Council, would not be deemed necessary or appropriate in this case. It is noted, in this connection, that Dr. Finney stated in March 1984, that, although depressed and worried about "situational problems," the claimant was in the best physical condition he had been in for many years.

The Appeals Council Order, as a basis for the remand effected by its Order and by the District Court Order, refers to Exhibit C-36 in connection with the possibility of a mental disorder. Exhibit C-36 consists of interrogatories propounded to Dr. Finney by the claimant's attorney and the physician's answers. The only exchange in this exhibit which could be interpreted, in the opinion of the undersigned, as bearing upon mental illness is Question 7, which read, "How did you determine that Mr. Lidy was 'not in distress' as stated in your report of September 12, 1983?" To such question, the physician replied, "To me, it

meant that he was not suffering a great deal of pain that precluded his standing up and walking in a satisfactory fashion. . . . 'Distress' to me means overt suffering to the point where one is upset, flustered, unable to perform daily duties . . ." The undersigned Administrative Law Judge is unable to read into the physician's reply just quoted (in significant part) any implication that the claimant suffers, or even claims, a mental disorder. Similarly, the reference in the answer to Question 9 of such interrogatory (noted above) characterizing the claimant as "depressed and worried" clearly relates his state of mind to "situational problems," there being, again, no implication of the existence of any severe mental impairment.

The matter of the claimant's alleged illiteracy is dealt with at considerable length in said prior hearing decision, on page 7, wherein it is concluded that the claimant is not functionally illiterate, but rather has a marginal education. In the opinion of the undersigned Administrative Law Judge, this conclusion remains valid, notwithstanding the claimant's submission of Exhibits AC-4 and AC-5 relative to ability to read and write. Such conclusion, on the other hand, is supported by Exhibit AC-3, which shows the claimant to have completed the fifth grade with essentially a "C" average (including the subjects of Language, Reading, Spelling, and Writing), and to have been promoted to the sixth grade at the end of the 1949-1950 school year. The same exhibit shows that while in the first semester of the seventh grade, the claimant attained scores of 70 in Language, Writing and Reading, and a score of 69 in Spelling. This information was obtained from the Vernon Public Schools, Vernon, Texas. It appears to be somewhat at variance with statements of the claimant contained in Exhibit AC-4.

The Administrative Law Judge has carefully evaluated the claimant's subjective complaints of pain, alleged to render him incapable of working. Pain, as such, cannot be measured qualitatively or quantitatively by objective medical standards, and the nature and degree thereof are, in each case, to be gauged to a large extent by the claimant's subjective complaints and the credibility thereof. The claimant doubtless experiences some discomfort. However, after carefully considering all relevant evidence, including but not limited to the claimant's complaints as stated and as reference in the medical records, current medications, daily activities, medical opinions, reports, and the claimant's appearance and actions, the Administrative Law Judge concludes that at no time relevant to this decision has such pain been of such intensity, frequency, and duration as to be disabling within the meaning of such term as used in the Act. The claimant's assertions of disabling pain are not deemed sufficiently credible to support a finding that pain prevents the claimant from engaging in substantial gainful activity.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act at least through the date of filing of his current application.

2. So far as is shown in the hearing record, the claimant has not engaged in substantial gainful activity since July 13, 1982.

3. The medical evidence establishes that the claimant has a low back pain syndrome, post-

operative laminectomies and fusion, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The evidence fails to demonstrate a degree of pain which would preclude the claimant from engaging in substantial gainful activity.

5. The claimant has the residual functional capacity to perform the physical exertion requirements of work except for lifting over 10 pounds frequently or 20 pounds occasionally, or prolonged sitting, standing, walking or bending. There are no nonexertional limitations (20 CFR 404.1545).

6. The claimant is unable to perform his past relevant work as a mechanic, farmer, self-service attendant, drill press operator, dozer operator, painter or steamer.

7. The claimant has the residual functional capacity to perform a limited range of light work (20 CFR 404.1567).

8. The claimant has been a "younger individual" at all times pertinent to this decision.

9. The claimant has a marginal education falling within the "limited or less" category (20 CFA 404.1564).

10. The claimant has acquired work skills referred to in the body of this decision, which he demonstrated in past work. Considering his residual functional capacity, these skills can be applied to meet the requirements of

semi-skilled work activities of other work which exists in significant numbers in the national economy (20 CFR 404.1568). Examples of such jobs are referred to in the body of this decision. These jobs exist in significant numbers within the State of Texas.

11. Since the claimant's residual functional capacity falls between sedentary and light work, both rules are referenced. Section 404.1569 of Regulations No. 4 and Rules 201.20 and 202.19, of Tables No. 1 and 2, respectively, of Appendix 2, Subpart P, Regulations No. 4, direct a conclusion that, considering the claimant's residual functional capacity, age, education, and work experience, he is not disabled.

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f)).

RECOMMENDED DECISION

It is the decision of the Administrative Law Judge that on the basis of the application filed on July 9, 1982, Nelley Lidy, Jr., is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Rollie D. Thedford
ROLLIE D. THEDFORD
Administrative Law Judge

July 21, 1986
Date

APPENDIX F

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION UPON REMAND OF THE APPEALS COUNCIL

IN THE CASE OF: NELLEY LIDY, JR.

CLAIM FOR: Period of Disability and Disability Insurance Benefits

440-36-9599

This case is before the Administrative Law Judge upon Appeals Council Order dated April 11, 1984. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability

commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 4. The regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.

Social Security Administration Regulations No. 4 requires the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b));
2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c));
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1 of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a nonexertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

The claimant appeared before the undersigned at Amarillo, Texas on November 24, 1984, for a supplemental hearing which was held in connection with the Appeals Council remand order dated April 11, 1984. The Council vacated the Administrative Law Judge's decision dated December 12, 1983 and remanded the

case for further proceedings, including a new decision. The order directed that the Administrative Law Judge to obtain a consultative neurosurgical examination, with a medical assessment of the claimant's ability to do work related activities, and an updated medical report from Dr. Lewis A. Finney regarding the claimant's current postoperative condition. The claimant was ably represented by Robert E. Barfield at both the hearing held before Administrative Law Judge Maxwell Darks on August 4, 1983 and the supplemental hearing held before the undersigned on October 24, 1984. The claimant's wife, June Lidy, testified at both hearings, and vocational expert, Tom S. Breedlove apeared and testified at the supplemental hearing.

The claimant filed his fourth application for disability insurance benefits on July 9, 1982 alleging disability since December 1980 due to back trouble. The claimant has had two prior hearings resulting in two affirmative decisions. The present application was first denied on September 10, 1982 on the basis that the claimant was engaging in substantial gainful activity. The claimant then submitted proof that he had ceased his work activity and a medical denial was issued on January 4, 1983. The claimant requested a hearing on February 9, 1983 subsequent to this hearing the case was affirmed by Administrative Law Judge's decision dated December 12, 1983. Request for review filed on January 6, 1984 led to the Appeals Council remand order of April 11, 1984. Exhibit C-12 shows the claimant is insured for disability insurance benefits at least through December 31, 1983; however, this does not reflect any work performed subsequent to 1980. Exhibit C-15 shows that the claimant performed work during most of 1981 and also worked at

a substantial gainful activity level from about March 1982 until July 13, 1982. This determination will be made through the date of this decision since an updated earnings record would most likely show that the claimant is currently insured.

Although the claimant has alleged December 1980 in the current application, the record shows that he worked as a service station attendant from August 1980 through December 1980; worked as a drill press operator from March 1981 through July 1981; worked as a dozer operator for a construction company from October 1981 until December 1981; and performed work as a mechanic from March 1981 through July 13, 1982. In view of this almost continuous work activity and the determination at exhibit C-15 that the claimant's work activity in 1982 was substantial gainful activity, the Administration Law Judge concludes that the claimant was engaged in substantial gainful activity until July 13, 1982.

The next question is whether or not the claimant had an impairment which significantly affected work related activities subsequent to July 13, 1982.

The claimant testified that he was born on December 17, 1935 and is presently 49 years old. He is five feet eleven inches tall, weighed about 186 pounds at the first hearing and about 198 pounds at the supplemental hearing. He testified that he completed two years of education and that he could not "really read or write" at the first hearing. He stated that he has a third grade education, with a poor ability to read and write, at the supplemental hearing. He is married, and has one of his nine children, age fourteen, living at home. The family was living on Workmen's Compensation benefits at the time of the first hear-

ing, but he stated they were existing on help from varicus charitable organizations and food stamps at the time of his supplemental hearing.

The claimant has been employed as an automobile mechanic, heavy equipment operator, drill press operator, service station attendant, and farm laborer during the relevant period. Dr. Breedlove classified this work as requiring medium to heavy exertion.

The claimant further testified that he originally injured his back in 1972 when he slipped and fell at work. On July 13, 1982 he reinjured his back when he again slipped and fell while working. On July 5, 1983 he underwent a laminectomy at the L5 level and a fusion. Since that time he has not noted any significant improvement in his symptoms and complained of numbness in both of his lower extremities. He estimated he could stand for about ten to fifteen minutes before he has to move around, can sit for approximately twenty minutes with pain up and down his back and legs and can only walk from one to two blocks before he experiences severe back pain. He can do very little bending, no lifting, no crawling, reaching or climbing. He reiterated the three back surgeries and complained of severe and constant pain. He said he must take a lot of medication to help the pain and that laying in bed relieves it for awhile. He is allergic to some medications and some drugs make him drowsy. He believes he is worse than when he first became disabled as he has muscle spasms in his back, pain in the buttock and although he does not not have a cane, he needs one. He said that after the last surgery was performed, the burning sensation was better.

The claimant's wife fully corroborated his testimony and added that he takes three to four pills a day and

cannot do anything. She believes he is getting worse as he cannot walk or get around as he use to.

The claimant's attending physician of long standing, Dr. Louis A. Finney, who is a board-certified neurosurgeon and who has submitted numerous reports on the claimant's behalf for Workmen's Compensation claims, generally describes his musculoskeletal condition as satisfactory prior to the last on the job injury which occurred on July 13, 1982. Since the claimant engaged in substantial gainful activity until that date, there is no reason to reiterate these reports except to note that Dr. Finney said that the claimant had no paraspinous muscle spasm, tenderness or intraspinous ligament discomfort and generally had good muscle strength in his lower extermities. Subsequent to the injury of July 13, 1982 Dr. Finney first thought that the claimant had pulled a ligament or muscle in his lower back. The claimant underwent conservative treatment which did not relieve the pain. Subsequent testing and consultation with Dr. Howard Berg led to a diagnosis of herniated nucleus pulposus fifth lumbar-first sacral level with total calcification of the discs including annulus fibrosis and left leg radicular pain. On July 5, 1983 the claimant underwent a bilateral interlaminar exploration, fifth lumbar-first sacral level, with removal of a totally calcified herniated nucleus puposus by means of drilling it out with a surgical airtome followed by transverse body fusion from the fifth lumbar level to the sacrum, which was accomplished by Dr. Berg. When the claimant returned to Dr. Finney of October 5, 1983 for a neurological evaluation, he was described with a well healed lumbar laminectomy incision, with some tenderness and some right infra-iliac crest gluteal discomfort, but none on the

left side. There was a touch of left sciatic notch discomfort, but none on the right side. Straight leg raising caused pelvic tilt at 70 degrees on the left side. Straight leg raising of the right leg was negative at 90 degrees. Knee and ankle reflexes were absent bilaterally, but there was excellent muscle strength and normal sensation in the lower extremities. Dr. Finney commented that Mr. Lidy was in the process of firming up his fusion and that he needed to be as active as possible when Dr. Berg took him out of the corset. When he returned for the next evaluation on January 26, 1984 he complained of stiffness in his low back but no real leg pain at that time. This examination showed *no* infra-iliac crest gluteal discomfort or sciatic notch discomfort. Straight leg raising was negative at 90 degree bilaterally. There was some discomfort over the sacro-illac joints bilaterally. He had excellent muscle strength in the lower extremities, and the sensory modalities were intact. Left and right knee and ankle reflects were absent. Again, he was instructed to do alot of walking and certain exercises as he describes as "kicking and stretching out of his back." Dr. Finney noted that he was released from further followup care by Dr. Berg on that date but was still wearing his corset. When last seen on March 28, 1984 he was having some trouble sleeping as he was worried about his bills. The examination was essentially the same as the last examination except that the right and left knee reflexes were present and physiological. On that date he was released to return to gainful employment.

Dr. Finney completed an interrogatory on January 3, 1985 in which he explained in detail how he arrived at his statements of clinical and laboratory findings and conclusions thereof. While not specifically reit-

erated within the body of this decision, exhibit C-36 has been fully considered in this matter and is considered adequate to fully explain his position in this matter. For this reason, counsel's request to subpoena Dr. Finney to the supplemental hearing and permit further live cross examination was denied by the undersigned. Further interogation or interrogatories of Dr. Finney would constitute repetition and would border on harrassment of a witness in the opinion of the undersigned.

A report dated August 30, 1983 by Howard L. Berg, M.D., who is the board-certified orthopedic surgeon who performed the claimant's last surgery, he states that the claimant has an overall 25 percent permanent physical impairment of function to the body as a whole as a result of his spinal injury. He refers the overall prognosis for future recovery to Dr. Finney.

To comply with the request of the Appeals Council, the claimant was scheduled for a neurosurgical consultative evaluation. On May 15, 1984 the claimant was examined by Howard W. Morgan, M.D., a board-certified neurosurgeon. The claimant stated that since his third operative procedure, he has been unable to go back to work. He said that he has rather constant pain in his low back which radiates into his lower extremities, more so on the left than the right. At times the pain is excruciating and at other time it is not quite as severe. He cannot stand or sit for more than short periods and said that he had to stop five or six times when driving to the examination to get out and stretch his legs. The claimant further reported to this physician that he has a third grade education and that he cannot read or write very well. He said that the only work he has done has been manual la-

bor. This physician described the claimant as a well developed, well nourished and pleasant adult black male who sat during the examination and interview in an somewhat awkward and uncomfortable position. He got up and down from the sitting position somewhat slowly and walked with a slow deliberate gait. He stood erect. He had a well healed incision, his back was flat and there was some muscle firmness in the paraspinous region along the skin incision. Range of motion of the low back was rather severely restricted in all directions and Dr. Morgan believed it to be at least 75 percent including flexion, extension, turning and bending. He was not particularly tender over the low back, but did have some tenderness over both the buttock and sciatic notch region. Straight leg raising was positive at 75 degrees on the left and positive at 90 degrees on the right. He had good pulses in the lower extremities and no significant varicosities in the lower extremities. There was no prominent atrophy or muscle weakness of the lower extremities, and his knee perks were somewhat hypoactive but symmetrical. Both ankle jerks were absent. He had diminished pin sensation over the left L5 and to a larger degree, the left S1 dermatomes.

Dr. Morgan further reported that x-rays of the lumbosacral spine showed a bony area of fusion posteriorly, more prominent between L5 and S1, and some bone also laterally. There appeared to be a laminectomy defect between L5 and S1 bilaterally and possibly also between L4-5 bilaterally as well as L3-4 on the right. He could not determine whether the fusion was solid, and believed there was reduction of the height of the L5-S1 disc space. Dr. Morgan finally concluded that the claimant has chronic pain syndrome secondary to his three operative procedures

of the low back and he believed he *most likely* had some chronic arachnoiditis. He believed the claimant to have objective mechanical and neurological changes and assessed him with a residual functional capacity for between sedentary and light work.

Consideration of the foregoing evidence shows that the claimant is severely restricted in work related activities, namely lifting, bending, stooping and prolonged walking, standing and sitting by reason of two back surgeries and a fusion. It appears that each time he returned work he probably exceeded his residual capacity and subsequently reinjured his back. Most people who have had multiple back surgeries are advised to not perform above a light level of exertion. Although the claimant's musculoskeletal condition is considered severe or restrictive, the bulk of the evidence does not show that it meets or equals pertinent sections within the Listing of Impairments found in Appendix 1. Although counsel has gone to great extent to determine this, Dr. Morgan's responses within interrogatories (exhibits C-35 and C-39) are not adequate to show that the claimant's abnormal facet joints meet or equal Listing 1.05A, particularly since this section has to do with arthritis. Likewise, there is insufficient evidence to show that the claimant's condition has been *consistently* of such severity to have met 1.05C of the Listing of Impairments.

The next question to consider is whether or not the claimant's condition limits him to a degree so as to preclude his past relevant work. In order to do this, one must consider his residual functional capacity. As previously stated, generally a person who has had several back surgeries and a fusion should not perform above light work. In the instant case, this young man has been assessed by Dr. Morgan as unable to

sit or stand for prolonged periods of time, and that he should carry only small non-heavy items and not do much lifting. He states he can walk short distances but should not do prolonged walking. He should be able to handle objects with his hands and should not do much bending. This, considered with the total evidence and the findings of Drs. Finney and Berg (Dr. Berg believed he was only 25 percent permanently impaired), the Administrative Law Judge concludes that the claimant has the capacity for a limited range of light work. Since most of his relevant work fell between the medium to heavy range, he could not return to his past relevant work.

Mr. Breedlove, vocational expert, testified that the claimant's prior work afforded him the following transferable skills:

1. Eye, hand and foot coordination;
2. use of hand tools;
3. ability to operate machinery;
4. drive a vehicle;
5. ability to communicate; and
6. ability to following instruction.

In response to the Administraitve Law Judge's hypothetical question that the claimant would retain capacity for a limited range of light work, with the limitations being doing alternate sitting and standing at will, the vocational expert enumerated the following jobs to which the above skills could be transferred and which would require only a minor adjustment:

1. Bench hand engine repair:
2. valve grinder—bench work (about 6 jobs exist in Amarillo and approximately 400 jobs exist within the state of Texas);

3. used car lot attendant, which requires wiping off the cars and starting up the cars each morning (about 6 jobs exist locally and 400 jobs exist within the State);
4. inside security guard or watchman;
5. salvage inspector of used article or clothing within Texas); and
6. vending route person.

The final step in the sequential evaluation procress under section 404.1520(f), requires consideration of the claimant's residual functional capacity, age, education and past work experience to see if he can do other work. It has already been determined that the claimant has the residual functional capacity for a limited range of light work. The claimant was 46 years old when he last engaged in substantial gainful activity on July 13, 1982. He is presently 49 years old. Thus, he has been a "younger individual," as defined in section 404.1563(b) at all times pertinent to this decision. Although counsel has indicated that the claimant is functionally illiterate, the remainder of the evidence would indicate otherwise. It is noted by the undersigned that the claimant testified in the last hearing and supplemental hearing that he had only a second to third grade education and further indicated that he can just barely or poorly read and write. He indicated within exhibit C-13 (Disability Report) that he has a fourth grade education and this same exhibit shows that he was not observed to have difficulty in either reading or writing during this interview. Examination of the prior hearings records show that within exhibit 18 (Disability Report dated February 2, 1978), the claimant stated he completed the seventh grade and quit in the eighth

grade. Likewise, exhibit 16 and 17 (both Medical History and Disability Reports), show that he completed the seventh and eighth grade, respectively. Also, exhibit 16 shows that he completed an automobile mechanic course. Additionally, none of these interviews observed any difficulties with the claimant reading or writing during any of these interviews. Exhibit B-12 also shows that the claimant completed the seventh grade. He did state he had trouble reading, but did not state he could not read. The remainder of the evidence does not suport a finding that the claimant is functionally illerate but, rather, that he has a marginal education which would fall into the "limited or less" category. Although the claimant told Dr. Morgan that he had performed only manual labor, the evidence shows that a good deal of his prior work falls within the semi-skilled category and affords trasferable skills as verified by the vocational expert testimony.

The Administrative Law Judge has carefully evaluated the claimant's subjective complaints of pain, alleged to render him incapable of working. Pain, as such, cannot be measured qualitatively or quantitatively by objective medical standards, and the nature and degree thereof are, in each case, to be gauged to a large extent by the claimant's subjective complaints and the credibility thereof. The claimant doubtlessly experiences some discomfort. However, after carefully considering all relevant evidence, including but not limited to the claimant's complaints as stated and as reference in the medical records, current medications, daily activities, medical opinions, reports, and the claimant's appearance and actions, the Administrative Law Judge concludes that at no time relevant to this decision has such pain been of such intensity, frequency, and duration as to

be disabling within the meaning of such term as used in the Act. The Administrative Law Judge further concludes the claimant's assertions of disabling pain are not deemed sufficiently credible to support a finding that pain prevents the claimant from engaging in substantial gainful activity.

In summary, we have a younger individual with a limited or less education and who has a residual functional capacity for a limited range of light work. Since his residual functional capacity falls between sedentary and light work, both rules will be referenced. Considering this vocatonal profile with a full range of sedenetary work, Rule 201.20 of Table No. 1 is applicable and declares a finding of "not disabled." Considering a full range of light work, Rule 202.19 of Table No. 2 is applicable and also dictates a finding of "not disabled." Therefore, the claimant is not disabled as defined by the Social Security Act, as amended.

FINDINGS

After careful consideration of the entire record, the administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on July 13, 1982, the date the claimant last engaged in substantial gainful activity, and continues to meet them through at least December 31, 1983. Since the claimant worked in 1981 and 1982 he is probably insured currently, and for this reason this determination will be made through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since July 13, 1982.

3. The medical evidence establishes that the claimant has a low back pain syndrome, post-operative laminectomies and fusion, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The evidence fails to demonstrate a degree of pain which would preclude the claimant from engaging in substantial gainful activity.

5. The claimant has the residual functional capacity to perform the physical exertion requirements of work except for lifting over 10 pounds frequently or 20 pounds occasionally, or prolonged sitting, standing, walking or bending. There are no nonexertional limitations (20 CFR 404.1545).

6. The claimant is unable to perform his past relevant work as a mechanic, farmer, self-service attentant, drill press operator, dozer operator, painter or steamer.

7. The claimant has the residual functional capacity to perform a limited range of light work (20 CFR 404.1567).

8. The claimant has been a "younger individual" at all times pertinent to this decision.

9. The claimant has a marginal education which will be considered in the "limited or less" category (20 CFR 404.1564).

10. The claimant has acquired work skills, such as enumerated in the body of this decision which he demonstrated in past work. Considering his residual functional capacity,

these skills can be applied to meet the requirements of semi-skilled work activities of other work which exists in significant numbers in the national economy (20 CFR 404.1568). Examples of such jobs are enumerated in the body of this decision. These jobs exist in significant numbers within the state of Texas.

11. Since the claimant's residual functional capacity falls between sedentary and light work, both rules are referenced. Section 404.1569 of Regulations No. 4 and Rules 201.20 and 202.19, of Tables No. 1 and 2, respectively, of Appendix T, Subpart P, Regulations No. 4, direct a conclusion that, considering the claimant's residual functional capacity, age, education, and work experience, he is not disabled.

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CRF 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on July 9, 1982, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Rollie D. Thedford
ROLLIE D. THEDFORD
Administrative Law Judge

June 30, 1985
Date

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1158

NELLEY LIDY, JR., PLAINTIFF-APPELLANT

versus

LOUIS W. SULLIVAN, M.D., SECRETARY OF
HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING
(November 28, 1990)

Before GEE, SMITH and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1158

Summary Calendar

D. C. Docket No. CA 2 85 0322

NELLEY LIDY, JR., PLAINTIFF-APPELLANT

versus

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH & HUMAN SERVICES, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Texas

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Before GEE, SMITH and WIENER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

September 17, 1990

Issued as Mandate: Dec. 10, 1990

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